



## COVID-19 Risk Management for SNFs – Government Enforcement

*This Article is Part 5 of 5 in EVOLVE's series on COVID-19 risk management for SNFs. In this Article of the series, we discuss the prospect of additional government enforcement actions during and following the pandemic.*

### ***Government enforcement typically increases following emergencies, and SNFs should be prepared for post-COVID scrutiny.***

We have outlined in detail over the past few months how the long-term care industry is incurring significant risk as they attempt to respond to COVID-19, including the possibility of civil lawsuits from residents, families, and staff members stemming from the pandemic. Unfortunately, SNFs may be facing legal actions not just from private citizens, but from the government as well. Indeed, recessions have historically been followed by increases in whistleblower activity and government enforcement, and early indications show that the COVID-19 pandemic and its resulting economic downturn will be no exception. Multiple signs point to SNFs facing future investigations, fraud claims, and even criminal prosecutions questioning their actions in response to the pandemic.

Enforcement relating to COVID-19 may be even more complicated by the fact that both private citizens and the government may be looking for someone to “blame” for deaths caused by the pandemic. There has been much public discourse about the actions that the government has taken in response to COVID-19, including SNF-related issues such as requiring facilities to admit residents with COVID-19, failing to make adequate testing available, closing and opening visitation, etc. At the same time, residents and families have publicly blamed SNFs for failing to protect their loved ones and to adequately communicate with them as visitation has been closed. Right, wrong, or indifferent, the government may have an additional incentive to place responsibility for negative outcomes on SNFs who allegedly failed in their response.

### ABOUT EVOLVE

*Evolve Legal Solutions LLC (EVOLVE) harnesses the power of technology to provide self-service, subscription-based legal solutions to SNFs. Subscribers to EVOLVE have access to manuals, policies and procedures, training modules, protocols, and other tools. EVOLVE has currently suspended charges for its COVID-19 SNF Legal Hub, containing practical resources on COVID-19 legal and risk management issues.*

### ***Government scrutiny of SNF quality of care was already on the rise prior to COVID-19.***

Notably, government agencies have been stepping up their enforcement efforts against nursing homes, even before the pandemic, particularly with respect to quality of care:

- In 2016, the United States Department of Justice (DOJ) launched 10 regional Elder Justice Task Forces to coordinate federal and state efforts to pursue SNFs providing substandard care.<sup>1</sup>
- The Centers for Medicare & Medicaid Services (CMS) joined in emphasizing a renewed focus on quality of care in April 2019, identifying a plan for enhanced attention to surveys, staffing, and quality of life for SNF residents.<sup>2</sup>
- In June 2019, Senators Pat Toomey and Bob Casey publicly released the list of candidates for the Special Focus Facility (SFF) program, prompting CMS to also begin publicly releasing the list of SFF candidates on a regular basis (as opposed to only identifying those SNFs actually named to the SFF list).<sup>3</sup>
- In March 2020, before COVID-19 began its rampant spread, the DOJ announced a National Nursing Home Initiative to coordinate efforts in pursuing SNFs providing “grossly substandard care” to residents. The DOJ announced that it had *already* commenced investigations into 30 SNFs in 9 different states as part of the initiative.<sup>4</sup>
- In August 2020, the Office of Inspector General (OIG) issued a report on nursing home staffing based on a study commenced prior to the pandemic, recommending that CMS enhance its efforts to ensure SNFs meet daily staffing requirements.<sup>5</sup>

Now, as SNFs are dealing with COVID-19 outbreaks and deaths on an unprecedented level, rumblings about quality of care have only intensified. Sufficient staffing and infection control, two key quality concerns, can greatly impact how well a SNF is able to respond to and control COVID-19 spread within its facility.

While some industry experts have argued that COVID-19 cases may be impacted more by surrounding community spread than SNF quality, CMS and other government agencies have stressed the significance of staffing, infection control, and quality in examining SNFs suffering COVID-19 outbreaks, and they have vowed to hold SNFs accountable for lapses in these areas. As we noted in our Survey & Regulatory Enforcement article in this series, CMS has already initiated focused infection control surveys, imposed additional reporting obligations on SNFs, and increased penalties for non-compliance. Senators Toomey and Casey followed up on their previous actions to focus on SNF quality by introducing a bill to expand

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<sup>1</sup> Department of Justice Press Release: Department of Justice Launches 10 Regional Elder Justice Task Forces, available [here](#).

<sup>2</sup> Ensuring Safety and Quality in America’s Nursing Homes, April 15, 2019, available [here](#).

<sup>3</sup> Johnson, S. *CMS to Publish List of Poorly Performing Nursing Homes*. Modern Healthcare, June 5, 2019, available [here](#).

<sup>4</sup> Department of Justice Press Release: Department of Justice Launches a National Nursing Home Initiative, available [here](#).

<sup>5</sup> HHS OIG Data Brief, August 2020, OEI-04-18-00450, available [here](#).

the SFF program to cover more SNFs, codify enforcement actions, and establish additional oversight.<sup>6</sup> While the bill has since “died” in the previous Congress, in announcing the bill, the Senators specifically linked the need for increased quality of care and accountability for SNFs to deaths of SNF residents from COVID-19. As the pandemic continues, government agencies tasked with investigating SNFs providing substandard care will certainly have additional arguments at their disposal for any SNFs unlucky enough to experience COVID-19 at high levels in their building.

***The receipt of CARES Act funds creates additional avenues for enforcement.***

Certainly, SNFs have suffered economic hardship due to the pandemic. The additional costs of securing PPE, testing, staffing, and more, combined with a loss in census, has placed many SNFs in untenable financial positions. While funds given to SNFs to provide relief from these additional costs and loss of business are certainly needed and welcome, they bring with them the potential for additional enforcement and scrutiny. In other words, the money comes with strings attached.

SNFs must comply with a myriad of requirements associated with receipt and use of any CARES Act funds received through the Provider Relief Fund (PRF) or Paycheck Protection Program (PPP). Unfortunately, because the funds were rushed out to respond to the crisis, they were issued without clear guidance as to who is eligible for the funds or how they may be used. To retain the funds, providers have had to attest that they will comply with the terms and conditions associated with the use of the funds, even without necessarily being provided those terms and conditions. Now, after the fact, the government is attempting to provide the parameters for receipt and use of the funds, but that guidance is constantly changing and being updated.

Despite this uncertainty and confusion, SNFs are still likely to be held accountable if they fail to provide appropriate certifications or if they use the funds for a non-approved use. In May 2020, the OIG announced a Strategic Plan for “Oversight of COVID-19 Response and Recovery,” noting that it would be using data analytics and risk analysis to identify potential fraud, waste, and abuse affecting its COVID-19 programs. In particular, the OIG noted that it would conduct audits and oversight associated with the awarding, disbursement, and use of relief funds. This means that if a SNF uses funds inappropriately or retains funds to which it was not entitled, it risks not only a takeback of the money received, but also potential civil and even criminal liability.

In addition, the receipt of CARES Act funds has implications for SNFs far beyond just using the funds appropriately – it significantly diminishes any hope for SNFs to garner sympathy for being cash-strapped by the pandemic. CMS clearly expects these funds to be used to maintain higher staffing levels and PPE needed to protect residents. Indeed, we have already seen CMS go down this path. In their recent announcement highlighting that many SNFs had failed to complete *free* staff training on COVID-19, CMS noted that SNFs had received billions in federal funding, PPE, testing, and support, and that SNF ownership now needed to take it upon themselves to ensure that their staffs are equipped to protect their residents.<sup>7</sup> Any argument that a SNF was unable to secure overpriced PPE, temporary staff at premier rates, or other

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<sup>6</sup> Flynn, M. Feds Look to Expand Special Focus Facility List of Poor-Performing Nursing Homes, Create New Ranking System. Skilled Nursing News, November 17, 2020, available [here](#).

<sup>7</sup> CMS Press Release: CMS Releases Nursing Home COVID-19 Training Data with Urgent Call to Action, available [here](#).

costly items, will be diminished in light of the significant funds that are being provided. And SNFs will also need to consider the optics associated with financial decisions, such as implementing cost-cutting measures or making profit distributions, during the pandemic. SNFs making these decisions may be viewed as enriching themselves at the expense of their residents' lives, particularly problematic when that enrichment is coming in the form of relief funds designed to protect those residents.

***Enforcement actions may come in the form of whistleblower claims under the False Claims Act.***

In addition to direct enforcement activity by CMS, SNFs should also anticipate potential whistleblower claims pursuant to the *qui tam* provisions of the False Claims Act. These provisions allow individuals to bring claims on behalf of the government, then to share in any recovery. The stresses of the pandemic and associated economic hardship will likely contribute to a rise in whistleblower activity. For example, employees receiving frequently changing PPE and infection protocol instructions may feel that their SNF is disorganized and failing when, in actuality, the changing directives show that the SNF is being responsive to updated guidance from CMS and the CDC. Staff members being stretched thin may blame the facility for failing to secure adequate staffing, even as SNFs struggle due to quarantines and a lack of individuals willing to put their lives on the line to work in a SNF setting. As a result, individuals may simply be more prone to engage in whistleblower activity.

The False Claims Act prohibits entities and individuals from submitting a false claim for payment by a federal health care program and from making false statements that are material to such claims. Violators can be liable for both civil and criminal penalties, as well as be banned from participation in federal health care programs. The government has indicated that it will be paying particular attention to potential fraud relating to the pandemic. Under the False Claims Act, fraud could include allegations such as:

- SNFs with significant COVID-19 prevalence in their facility provided such poor care to residents that the services were essentially “worthless,” and, consequently, billing for the services constituted the submission of false claims.
- SNFs submitted false claims by billing Medicare under Section 1135 waivers of the 3-day hospital stay that did not, in fact, meet the requirements of those waivers, because the reason for the waiver did not appropriately relate to COVID-19.
- SNFs inappropriately accepted or used CARES Act funds to which they were not entitled, making false statements material to claims submitted to federal health care programs when they attested that they would comply with the applicable terms and conditions of receipt of the funds.

***In addition to civil claims, SNFs also face a risk of criminal enforcement associated with responding to COVID-19.***

While civil enforcement can result in significant penalties, SNF owners, administrators, and even direct care providers face the even more distressing prospect of potential *criminal* actions associated with their provision of care to individuals during the pandemic. Over the past several years, we have seen the DOJ, as well as state Attorneys General, focus on holding individuals accountable for failures at their organizations. With COVID-19, failures may be caused by a lack of staffing, inability to secure PPE, poor

judgment in implementing infection protocols, and more. Accountability for these kinds of issues may unfortunately come in the form of indictments against those responsible for operating the SNF, alleging crimes such as negligent homicide, abuse, and neglect.

In fact, we have already seen news reports throughout the United States showing that states are going to be aggressive in criminal enforcement relating to COVID-19. Reports have included:

- The superintendent and medical director of a state-run veterans' home in Massachusetts where 76 residents died have been indicted for criminal neglect.<sup>8</sup> The Massachusetts Attorney General stated that their actions, including combining units where residents had varying COVID-19 statuses, placed residents at higher risk of contracting COVID-19 and death. These charges could result in prison time for the individuals.
- In May, agents from the Ohio Attorney General's health care fraud unit raided a facility pursuant to a COVID-19-related search warrant.<sup>9</sup> A complaint made to the Attorney General alleged that the facility had failed to properly test and separate residents or provide sufficient PPE.
- The Pennsylvania Attorney General announced in May that it had opened criminal investigations into "several" nursing homes in the state for criminal neglect of patients and residents, affirming that it would hold the facilities criminally accountable for failing to properly provide care, even as they were on the front lines of the pandemic.<sup>10</sup> The Pennsylvania Attorney General further encouraged individuals to report complaints to its tip line. And in September, the Attorney General and the Federal Bureau of Investigation executed search warrants on at least two SNFs, including one that was confirmed as the subject of a criminal neglect investigation.<sup>11</sup>

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<sup>8</sup> Diaz, J. *Two Charged in Coronavirus Outbreak at Veterans' Home That Left 76 Dead*. New York Times, September 25, 2020, available [here](#).

<sup>9</sup> Myers, J. *Ohio Attorney General's Office Raids Worthington Nursing Home in 'Covid-Related' Search Warrant*. The Columbus Dispatch, May 5, 2020, available [here](#).

<sup>10</sup> Pennsylvania Office of Attorney General Press Release, May 12, 2020, available [here](#).

<sup>11</sup> Stelloh, T. *FBI Raids Pennsylvania Nursing Home Where Hundreds Caught Coronavirus, Dozens Died*. NBC News, September 4, 2020, available [here](#).

## Proactive Risk Management Strategies – Government Enforcement

With the threat of both civil and criminal enforcement activities on the horizon, SNFs need to consider how to best mitigate their associated risks now. SNFs should bear in mind that the moment an investigation commences, investigators are already likely forming an opinion of the character of their organization. This means that SNFs will not get “credit,” so-to-speak, for any post-investigation remedial efforts, documentation, etc. This means that SNFs need to plan ahead and ensure that their documentation, their compliance efforts, and their results on the ground demonstrate a quality, compliant organization, all before any investigator comes knocking.

In particular, SNFs may wish to consider the following activities for risk mitigation associated with government investigations:

- ***Create a COVID-19 timeline and organized documentation folder.***

As we have stressed in our previous articles in this series, it is essential for SNFs to make sure that all of their COVID-19 response efforts are well documented and organized. With guidance changing on an almost daily basis, SNFs need to reflect dates and applicability clearly on policies and procedures so that they can demonstrate changes being made in response to updated guidance. Keep documents demonstrating all efforts to secure PPE, staffing, and testing to demonstrate that the SNF was trying to secure these items, even if the attempts were unsuccessful.

Timelines and documents are going to be particularly important to refresh memories after the fact, as witnesses are likely to forget details regarding events and policies during such a tumultuous period.

- ***Conduct exit interviews for all terminated employees.***

Conduct exit interviews with any individuals leaving the organization to identify whether they have any concerns about the organization that have not been identified or alleviated. Whistleblowers are often individuals who either feel that they were treated unfairly or believe that their complaints were not being heard by their employer. This practice can not only assist in identifying any meritorious allegations, but may also help to assure individuals that their complaints are not being ignored.

- ***Double down on compliance efforts.***

Admittedly, compliance programs and considerations may take a backseat in times of high stress and needed focus on care delivery. While continuing to provide quality patient care is certainly the SNF's first priority, try to re-engage staff with the compliance program. Have leaders in the organization demonstrate through direct communications the “tone from the top” that compliance is still an important and expected goal for the organization. Encourage reporting of any compliance issues, including concerns relating to COVID-19.

- ***Monitor updates relating to acceptable use of CARES Act funds.***

Task an individual with responsibility for monitoring CARES Act fund updates and confirming that the funds are being used as permitted. Because the requirements are still being fully formed by the government, actions may be needed as changes are made to the relevant guidance. Work with legal

counsel as necessary to confirm that the SNF is using the funds for permitted uses to “prevent, prepare for, and respond” to COVID-19.

- ❑ ***Review and update accounting practices to confirm that your organization is following applicable guidance with respect to CARES Act funds.***

In addition to tracking changes on acceptable use, it is important that the SNF confirm that its accounting documents appropriately reflect and account for CARES Act funds, both for verifying appropriate use and demonstrating eligibility for funds received.

- ❑ ***Review use of the 3-day stay waiver for Medicare claims.***

Implement audit protocols to review the appropriateness of any claims billed using the Section 1135 3-day stay waivers. If any claims were billed that are identified as not qualifying for the waiver, refund the overpayments in accordance with the organization’s policies and procedures relating to the Overpayment Rule.

- ❑ ***Carefully consider the optics of any cost-cutting measures and financial expenditures.***

While relief funds provided to SNFs may turn out to be only a drop in the bucket once the third (or more) wave of COVID-19 has passed, they do have implications for how SNFs choose to spend, and save, their money. Therefore, before making any cost-cutting measures that could have an impact on quality of care, and before making any non-essential expenditures, think about how the decision could be viewed by government enforcement agencies, residents, and staff, with careful consideration to receipt of relief funds.

- ❑ ***Ensure staff know how to respond to government investigators who may appear on their doorstep or at the facility unannounced.***

Even with the best compliance efforts, there is still a risk that your SNF could be involved in a government investigation. It is important that all staff members understand how to respond to government investigators, who can show up at the facility, or even at an employee’s home, without warning. Your SNF will want to have a clear and concise policy that all staff members understand so that, in the event they do come into contact with an investigator, they understand their rights. Also, make sure that staff members know who to contact if they are served with a warrant or similar request at the facility.

- ❑ ***Be prepared to answer to a variety of agencies who are going to be looking at your COVID response.***

SNFs should be ready to face increased scrutiny from a variety of government sources, including some who may not have previously been high on your enforcement radar. For example, the U.S. Department of Housing and Urban Development (HUD) has taken the position that the presence of COVID-19 in a SNF creates an emerging threat to occupancy, employees, and operations, and requires relevant notifications to HUD.<sup>12</sup> Indeed, we have seen HUD request documentation of infection

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<sup>12</sup> Office of Healthcare Programs Questions and Answers for External Stakeholders, available [here](#).

control policies, quarantine plans, and more from SNFs that have experienced an outbreak. The Occupational Safety & Health Administration (OSHA) also has stepped up investigation and enforcement efforts at SNFs, particularly in recent months, in response to staff deaths from COVID and complaints about worker safety during the pandemic. SNFs should be prepared to provide relevant documentation and respond to inquiries from a variety of government sources.